

Minutes

D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING

Tuesday, June 5, 2018

Location: 955 L'Enfant Plaza, SW, Suite 2500

Washington, DC 20024

Persons Present: Lasheka Brown (OEA General Counsel), Sheila Barfield (OEA Executive Director), Sommer Murphy (OEA Deputy General Counsel), Sheree Price (OEA Board Chair), Patricia Hobson Wilson (OEA Board Member), Vera Abbott (OEA Board Member), Jelani Freeman (OEA Board Member), Wynter Clarke (OEA Paralegal), and Jason Gulley (Member of the Public).

- I. Call to Order** – Sheree Price called the meeting to order at 11:02 a.m.
- II. Ascertainment of Quorum** – There was a quorum of Board members present for the office to conduct business.
- III. Adoption of Agenda** – Vera Abbott moved to adopt the Agenda. Patricia Hobson Wilson seconded the motion. The Agenda was adopted by the Board.
- IV. Minutes from Previous Meeting** – The April 24, 2018 meeting minutes were reviewed. There were no corrections. The minutes were accepted.
- V. New Business**

A. Public Comments on Petitions for Review

1. Jason Gulley stated that his demotion and suspension was unwarranted. He explained that his comments were about social class, but they were not racist. Employee compared his case to the cases of three other officers who used profanity and/or derogatory language, but they were not disciplined or demoted. Employee explained that he did not address the three officers' cases in his Motion to Deny Petition for Review because the information was not made available to him at the time of his submission.

B. Summary of Cases

1. **Stephen Sharp v. Metropolitan Police Department, OEA Matter No. 1601-0047-17** – Employee worked as a Police Officer with Agency. On April 19, 2017, Agency issued a final notice of adverse action to Employee. It charged him with “neglect of duty to which assigned, or required by rules and regulations adopted by the Department” and “failure to obey orders or directives issued by the Chief of Police.” The notice provided that Employee was suspended without pay for seven workdays to include fifteen workdays that were held in abeyance from a prior adverse action. The notice concluded by providing that the total number of suspension days was twenty-two days. The effective date of Employee's suspension was April 18, 2017.

Employee challenged the adverse action and filed a Petition for Appeal with OEA. He asserted that Agency conducted an improper and biased investigation. Therefore, Employee requested that OEA rescind the adverse action and his suspension without pay.

Agency contested Employee's assertions that it did not conduct an improper and biased investigation. Consequently, on August 14, 2017, Agency filed a Motion for Summary Disposition. It claimed that it did not issue a final decision in this matter.

Additionally, Agency asserted that OEA did not have jurisdiction over the appeal because Employee received a seven-day suspension. Agency explained that the additional fifteen suspension days were initially imposed in a previous adverse action matter, and therefore, was not at issue in the instant matter. Thus, Agency requested that the matter be summarily dismissed.

Employee filed a response to Agency's Motion for Summary Disposition and argued that pursuant to OEA Rule 604.1, OEA had jurisdiction over the matter because his suspension was for twenty-two days, which was greater than the ten-day jurisdictional requirement. Additionally, Employee explained that the penalty could impact his promotion potential because in accordance with the Collective Bargaining Agreement, "if after the eligibility list is formed, a final disciplinary penalty of a suspension of twenty days or greater is imposed, the member need not be promoted from the list." Therefore, he requested that Agency's Motion for Summary Disposition be denied.

On November 29, 2017, the OEA Administrative Judge ("AJ") issued his Initial Decision. He found that Agency's argument that it did not issue a final decision lacked merit. He explained that a Notice of Proposed Adverse Action was issued on January 31, 2017, which advised Employee of the charges and specifications against him. Subsequently, Employee responded to the proposed adverse action against him, and Agency issued its Final Notice of Adverse Action on April 19, 2017. The AJ opined that Agency's April 19, 2017 Notice became Agency's Final decision. Further, the AJ held that OEA did not have jurisdiction over Employee's seven-day suspension. He explained that Agency exercised its right to impose the fifteen days held in abeyance from the previous disciplinary action. The fifteen days were tacked on to the seven-day penalty imposed in the instant appeal. Thus, the AJ determined that the fifteen suspension days are attributed to the disciplinary penalty imposed in Employee's previous adverse action. Accordingly, the AJ granted Agency's Motion for Summary Disposition and dismissed Employee's Appeal for lack of jurisdiction.

Employee filed his Petition for Review on January 2, 2018. He asserts that the AJ failed to address all of the issues of law and fact stated in the Initial Decision. Employee argues that the AJ failed to address his arguments regarding the amount of days held in abeyance and the impact that the suspension had on his promotion potential. Finally, Employee maintains that OEA has jurisdiction over his twenty-day suspension and the current suspension. Therefore, he reasoned that Agency's Motion for Summary Disposition be denied.

- 2. Elizabeth Aviles-Wynkoop v. D.C. Office of Contract and Procurement, OEA Matter No. J-0034-17** – Employee worked as a Contract Specialist with Agency. On November 7, 2016, Agency issued a termination notice to Employee. According to Agency, Employee was removed from her position pursuant to Chapter 8, Section 814 of the D.C. Personnel Regulations ("DPR"). Specifically, Agency explained that Employee was removed during her one-year probationary period. The effective date of Employee's removal was November 21, 2016.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on February 28, 2017. She argued that Agency improperly placed her in a probationary status. Employee explained that prior to her employment with Agency she held a federal career appointment during which she completed her probationary period. Consequently, she provided that pursuant to D.C. Official Code § 1-631.02, she was exempt from serving a probationary period as a Career Service employee

with the District government. Accordingly, Employee requested that her termination be overturned and that her accrued annual and sick leave be restored at the proper rate of eight hours per pay period.

On May 10, 2017, Agency filed a response to Employee's Petition for Appeal. It provided that Employee was properly removed, as she was only one month into her probationary period. Agency reasoned that Employee's argument was inherently flawed that she was not required to serve a probationary period because she had completed the requirement during her federal career appointment. Agency did not dispute that Employee satisfied her probationary period with the federal government. However, it asserted that Employee was notified of her requirement to serve a probationary period as a District government employee new hire. Additionally, Agency argued that Employee did not have the statutory right to appeal her removal to OEA, as OEA's jurisdiction is restricted to employees who have attained permanent status. Furthermore, Agency claimed that Employee's petition was untimely filed. It provided that Employee challenged its removal action on February 28, 2017, nearly three months after the effective date, and well beyond the required thirty-day appeal period. As a result, Agency reasoned that OEA lacked jurisdiction because it could not consider appeals of probationary employees. Therefore, it requested that Employee's Petition for Appeal be dismissed.

On November 8, 2017, the AJ issued her Initial Decision. She found that there was no evidence in the record to support a finding that Employee's completion of one or more probationary periods in the federal sector exempted her from serving a probationary period when she began her employment with Agency. Moreover, the AJ found that the submissions by Agency reasonably lead to the conclusion that Employee was required to serve a probationary term with Agency; that she was terminated during her probationary period; and that Agency complied with the notice requirement provided by Chapter 8 of the DPR. Accordingly, she ruled that pursuant to DPM § 813.3, Employee was in a probationary status at the time of her termination. Thus, she held that OEA lacked jurisdiction over Employee's appeal.

Employee filed her Petition for Review on December 29, 2017. She cites to several federal and District government statutes and regulations which she believes proves that she did not have to serve a new probationary period. Employee maintains that OEA has jurisdiction over Agency's termination action. Therefore, she requests that the Initial Decision be reversed.

- 3. Terri Jenkins v. Office of the State Superintendent, OEA Matter No. 1601-0016-11** – Employee worked as a Motor Vehicle Operator with Agency. On October 18, 2010, Agency issued a Final Notice of Adverse Action, charging Employee with “conviction of a misdemeanor based on conduct relevant to an employee's position, job duties, or job activities.” According to Agency, a review of Employee's criminal background check revealed that she was arrested by the D.C. Metropolitan Police Department on July 30, 2004, and was charged with two misdemeanor counts of Threats to Do Bodily Harm. The effective date of her termination was November 5, 2010.

Employee filed a Petition for Appeal with OEA on November 5, 2010. She argued that Agency was fully aware of her previous misdemeanor charges when it hired her. Therefore, Employee requested to be rehired and or to be reinstated to a different position. On November 19, 2011, Employee filed a Motion for Sanctions because

Agency did not file an Answer in a timely manner. Employee requested that Agency provide her with a copy of its response.

On October 12, 2012, the AJ issued an Order for Statement of Good Cause to Employee because she failed to submit a prehearing statement and failed to attend the October 12, 2012 prehearing conference. She was also warned that the failure to comply could result in the imposition of sanctions. Employee did not provide a response to the AJ's Order.

In his Initial Decision, the AJ provided that Employee was warned that the refusal to comply with orders from this Office could result in sanctions, including dismissal. Employee failed to attend the prehearing conference. Employee also failed to submit a statement of cause to the AJ to explain her absence. Thus, in accordance with OEA Rule 621.3, the AJ held that a Petition for Appeal may be dismissed when an employee fails to prosecute his or her appeal before this Office. The AJ provided that both the order for a prehearing conference and the cause order were both sent by first class mail to Employee at the address she provided on her appeal form. Because Employee failed to comply with the orders, the AJ concluded Employee's Petition for Appeal was required to be dismissed for failure to prosecute.

On December 18, 2017, Employee filed a Motion to Re-Open the record. She explains that she was incarcerated until 2014, and did not receive either of the AJ's orders. In addition, she reiterates that Agency was aware of her previous conviction at all times, and opines that Agency should not have terminated her for a minor conviction that was not related to her job duties. Thus, Employee requests that the Board re-open her appeal and allow the matter to be adjudicated on its merits.

4. Jason Gulley v. Metropolitan Police Department, OEA Matter No. 1601-0025-17

– Employee worked as a Lieutenant with Agency. On September 16, 2016, Agency issued a Notice of Proposed Adverse Action to Employee, charging him with “failure to obey orders or directives issued by the Chief of Police” and “any conduct not specifically set forth in this order which is prejudicial to the reputation and good order of the police force.” According to Agency, on July 27, 2016, while on duty, Employee was overheard by other officers making disparaging remarks regarding the residents of the Sixth District. It also alleged that Employee was “less than fully forthright” when he submitted a written statement on July 28, 2016. On December 6, 2016, Agency issued a Final Notice of Adverse Action, demoting Employee's rank from Lieutenant to Sergeant and suspending him for thirty days with five days held in abeyance.

On January 30, 2017, Employee filed a Petition for Appeal with OEA. He argued that Agency failed to provide him with due process, and stated that the imposed penalty was overly harsh and racially motivated. As a result, he requested that Agency's adverse action be reversed. Agency filed an answer on March 1, 2017. It denied Employee's substantive claims and requested that OEA conduct an evidentiary hearing.

With respect to Charge No. 1, the AJ concluded in his Initial Decision that Employee stated that many, but not all, of the citizen complaints in the Sixth District were either on welfare or had a criminal record. Accordingly, he did not opine that Employee violated Agency's General Order. According to the AJ, none of Employee's statements on June 27, 2016 constituted name-calling, derogatory, disrespectful, or offensive speech. The AJ also provided that Employee's remarks were not racially

motivated or disrespectful because he was addressing an African-American officer during the event in question. Additionally, the AJ stated that the standard of review for what is proper speech and conduct for police officers must be based on an objective standard.

As it related to Charge No. 2, the AJ found Employee's testimony to be more credible than Agency's sole witness, Sergeant Kimberly Carter. He noted that Agency could have strengthened its position by having Officer Gerthaline Pollock ("Pollock") testify during the OEA hearing. However, in failing to do so, the AJ believed that Pollock's written statement constituted hearsay that was not able to be tested on cross-examination. Based on the foregoing, the AJ found that Agency did not meet its burden of proof and ordered Agency to reverse Employee's demotion and suspension, with back pay and benefits.

In its Petition for Review, Agency argues that the evidence is sufficient to support a finding that Employee made comments that might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person. Agency further clarifies that Employee's comments are not protected by the First Amendment and that the AJ erroneously relied on the holding in *In re S.W.* in his decision. It also opines that the AJ's findings were incomplete; based on the wrong legal standard; and did not address each of Employee's allegedly offensive statements. Additionally, Agency states that Employee's comments violated General Order 201.09 as a matter of law. Lastly, Agency believes that there is sufficient evidence in the record to show that Employee was less than forthright when he denied declaring that citizen complaints were a waste of time. Therefore, it requests that the Board grant the Petition for Review, or remand the matter to issue new findings of fact based on the correct legal standard for each charge.

In response, Employee argues that the case law relied upon by Agency lacks merit and is irrelevant to the issues presented before OEA. He contends that contrary to Agency's position, General Orders cannot be violated as a matter of law. He also states that Agency violated its own General Orders by using race and gender as a basis for investigating misconduct. Accordingly, Employee asks that the Board deny Agency's Petition for Review and uphold the Initial Decision.

- C. Deliberations** - After the summaries were provided, Patricia Hobson Wilson moved that the meeting be closed for deliberations. Vera Abbott seconded the motion. All Board members voted in favor of closing the meeting. Sheree Price stated that, in accordance with D.C. Official Code § 2-575(b)(13), the meeting was closed for deliberations.

D. Open Portion of Meeting Resumed

- E. Final Votes** –Sheree Price provided that the Board considered all of the matters. The following represents the final votes for each case:

1. Stephen Sharp v. Metropolitan Police Department

| MEMBER | GRANTED | DENIED | REMANDED | DISMISSED |
|------------------------|---------|--------|----------|-----------|
| Sheree Price | | X | | |
| Vera Abbott | | X | | |
| Patricia Hobson Wilson | | X | | |
| Jelani Freeman | | X | | |

Four Board Members voted in favor of denying Employee's Petition Review. Therefore, the petition was denied.

2. Elizabeth Aviles-Wynkoop v. D.C. Office of Contract and Procurement

| MEMBER | GRANTED | DENIED | REMANDED | DISMISSED |
|------------------------|---------|--------|----------|-----------|
| Sheree Price | | X | | |
| Vera Abbott | | X | | |
| Patricia Hobson Wilson | | X | | |
| Jelani Freeman | | X | | |

Four Board Members voted in favor of denying Employee's Petition for Review. Therefore, the petition was denied.

3. Terri Jenkins v. Office of the State Superintendent of Education

| MEMBER | GRANTED | DENIED | REMANDED | DISMISSED |
|------------------------|---------|--------|----------|-----------|
| Sheree Price | | | | X |
| Vera Abbott | | | | X |
| Patricia Hobson Wilson | | | | X |
| Jelani Freeman | | | | X |

Four Board Members voted in favor of dismissing Employee's Petition for Review. Therefore, the petition was dismissed.

4. Jason Gulley v. Metropolitan Police Department

| MEMBER | GRANTED | DENIED | REMANDED | DISMISSED |
|------------------------|---------|--------|----------|-----------|
| Sheree Price | | | X | |
| Vera Abbott | | X | | |
| Patricia Hobson Wilson | | | X | |
| Jelani Freeman | | | X | |

Three Board Members voted in favor of remanding the matter to the Administrative Judge for further findings. Therefore, the petition was remanded.

- F. Public Comments** – Jason Gulley asked for clarification of the Board's decision. The Board provided that the matter was remanded to the Administrative Judge for further findings, and he would hear from the judge regarding next steps.

- VI. Adjournment** –Jelani Freeman moved that the meeting be adjourned; Patricia Hobson Wilson seconded the motion. All members voted affirmatively to adjourn the meeting. Sheree Price adjourned the meeting at 12:01 p.m.

Respectfully Submitted,
Wynter Clarke
Paralegal Specialist